Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 30, 2001

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QUESTION PRESENTED

Whether a state-regulated private utility enjoys state-action immunity from antitrust liability for its monopolization of an unregulated market by means of non-price anti-competitive conduct neither approved nor supervised by the State.

LIST OF PARTIES

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Trigen-Oklahoma City Energy Corporation ("Trigen") was the plaintiff in the district court and the appellee/cross-appellant in the court of appeals. Respondent Oklahoma Gas & Electric Company ("OG&E") was the defendant in the district court and the appellant/cross-appellee in the court of appeals.

LIST PURSUANT TO RULE 29.6

Petitioner Trigen, a Delaware corporation, is a direct wholly-owned subsidiary of Trigen-Oklahoma Energy Corporation, a Delaware corporation. Trigen-Oklahoma Energy Corporation is not publicly-held; it is a direct wholly-owned subsidiary of Trigen Energy Corporation, a Delaware corporation. Accordingly, no publicly-held company owns 10% or more of Trigen's stock. Trigen Energy Corporation, in turn, is a direct wholly-owned subsidiary of ELYO, a French corporation. ELYO is a direct wholly-owned subsidiary of Tractebel, a Belgian corporation. Tractebel is a direct wholly-owned subsidiary of Suez, a publicly-held French corporation.

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Petitioner respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 244 F.3d 1220 and is reproduced at App. 1a-15a, *infra*. The order of the court of appeals denying rehearing and rehearing *en banc* is unreported and is reproduced at App. 23a. The amended judgment entered by the district court and reversed by the court of appeals is unreported and is reproduced at App. 16a. The order of the district court on the parties' post-trial motions is unreported and is reproduced at App. 18a.

JURISDICTION

The court of appeals entered its judgment on April 3, 2001, and entered its order denying rehearing and rehearing *en banc* on May 1, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of 15 U.S.C. §§ 2 & 15; Okla. Const. art. IX, §§ 18, 19, 20 & 24; and 17 Okla. Stat. § 152 are reproduced at App. 25a-32a.

STATEMENT

Trigen brought this antitrust suit challenging the non-price anti-competitive conduct that OG&E employed (as the jury found) to monopolize the market for cooling services in downtown Oklahoma City, in violation of § 2 of the Sherman Act. OG&E's challenged conduct, which included

misrepresentations, interference with contract, improper payments, and other exclusionary conduct not related to OG&E's rates, was neither authorized by a state law nor supervised by a state agency. Nonetheless, the Tenth Circuit held that because of OG&E's status "[a]s a state-regulated electric utility, OG&E has clearly met the two-prong test for state action immunity." App. 9a. Trigen seeks review of the court of appeals' expansion of the state-action immunity doctrine in direct and substantial conflict with this Court's precedents.

1. *OG&E's Anti-Competitive Conduct.* Trigen is in the business of providing cooling services to commercial and government buildings in downtown Oklahoma City. Trigen provides cooling services by chilling water at a large, centrally-located facility and circulating the chilled water to customers' air-conditioning units through a network of pipes. Because a building that uses Trigen for cooling services does not need to install its own electricity-powered air-conditioning plant, Trigen's initial success in obtaining long-term cooling services contracts (20 years or longer) alarmed OG&E, the privately-owned utility that enjoys the State's exclusive franchise to provide electric service in Oklahoma City until deregulation is implemented.

OG&E therefore put into effect a comprehensive predatory scheme that it labeled a "Plan of Action" to "remove customers from Trigen" and to deny Trigen any new cooling services customers. OG&E's Plan notably did not involve competing on the merits, *i.e.*, by lowering its prices or improving its services.[1] To the contrary, as the jury

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[1] *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.") (quoting R. Bork, *The Antitrust Paradox* 138); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (per curiam) (stating that "competition on the merits . . . involves, for example, greater efficiency or enhanced consumer appeal").

found, OG&E succeeded in monopolizing the relevant market for cooling services by means of non-price anti-competitive conduct.[2]

The jury heard evidence of extensive and varied non-price predatory conduct in furtherance of OG&E's Plan. Among other things, OG&E targeted Trigen's existing and potential customers and falsely disparaged Trigen's rates and services; OG&E misrepresented the potential benefits of its own cooling-services proposals, which included monetary grants and financing and construction packages; OG&E disregarded its counsel's advice not to "help" Trigen customers "break" their contracts; OG&E provided special financial "thermal storage grants" and other benefits to Trigen's customers that had no business purpose other than to exclude Trigen from the cooling-services market; OG&E employed consultants solely for their ability to target Trigen's customers; and OG&E treated Trigen's existing and prospective customers to meals, drinks, golf, flights on its corporate jet, and out-of-town junkets. In addition, characterizing its payments as "Trigen competition," OG&E hired the son of the Oklahoma County commissioner whose vote OG&E needed to prevent the County from extending its contract with Trigen and paid the son's shell company $138,000 for no apparent work.

The Oklahoma Corporation Commission ("OCC") never approved, or even considered, any of this non-price anti-competitive conduct. OG&E has never contended otherwise. In fact, the only involvement of the OCC in any facet of OG&E's conduct at issue in this case was its approval of a so-called "real-time pricing" (or "RTP") electric rate tariff. Rather than specify a particular rate for a customer's use of

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[2] Extensive evidence demonstrated that the relevant market was the market for cooling services to commercial and government buildings in downtown Oklahoma City, and the jury so found. 10th Cir. App. vol. III at 476 (charge). OG&E did not present any evidence to support an alternative definition of the relevant market.

electricity, this tariff contained formulae for flexible day-ahead and week-ahead pricing, which could be useful to certain customers able to shift their usage of electricity to non-peak times. Even before the OCC approved this tariff, OG&E offered it to Oklahoma City for the Myriad convention center, and misrepresented that it would result in an average electricity cost of 1.8 cents per kilowatt hour, with full knowledge that the Myriad would be unable to achieve such a low cost. The OCC had no role in OG&E's Myriad offer and never approved, or even considered, this misrepresentation.[3]

2. *The Jury's Verdict.* After hearing all the evidence, the jury found (*inter alia*) that OG&E had monopolized "the market for cooling services to commercial and government buildings in downtown Oklahoma City." 10th Cir. App. vol. III at 476 (charge).[4] The jury found that Trigen had been damaged thereby and awarded damages, which the district court trebled and adjusted to avoid duplication. After denying OG&E's motion for judgment as a matter of law or a new trial under Fed. R. Civ. P. 50(b) and 59, App. 18a-22a, the district court entered judgment for $20,641,548, all but $179,226 of which represented damages that Trigen suffered

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[3] At no time did Trigen ever contend that the RTP tariff itself was predatory. Far from contending that the formulae in this tariff would result in rates that were "too low," Trigen's complaint was precisely the opposite: that because this tariff in reality would result in cooling-services costs for the Myriad that were *higher* than Trigen's cooling-services costs, OG&E could not compete on the basis of price and consequently resorted to *non-price* predation as described in the text.

[4] The jury also found that OG&E had restrained trade and discriminated in violation of 79 Okla. Stat. §§ 1 & 4 and had engaged in tortious interference with contract and with prospective economic advantage in violation of the common law of Oklahoma. App. 2a. Having found actual monopolization, the jury did not reach Trigen's claim of attempted monopolization in violation of § 2 of the Sherman Act. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337 & 1367.

in its business or property as a result of OG&E's violation of § 2 of the Sherman Act. App. 16a-17a.

3. *The Court of Appeals' Decision.* OG&E argued on appeal that Trigen's antitrust claims were entirely barred under the state-action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny.[5] This Court has made clear that a State's immunity does not extend to anti-competitive conduct by a private party such as OG&E "unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by [the] private actor[ ]." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

The Tenth Circuit, however, adopted an expansive view of the state-action immunity doctrine that bears no resemblance to the narrow doctrine recognized by this Court. *First*, rather than analyze whether Oklahoma clearly authorized or actively supervised "the particular anticompetitive conduct at issue," *id.* at 634, the court below did not look past OG&E's status as a regulated utility. "As a state-regulated electric utility," the court held, "OG&E has clearly met the two-prong test for state action immunity." App. 9a.

Second, rather than require OG&E to carry the "rigorous" burden of demonstrating that its challenged conduct was authorized and actively supervised by the State, *Patrick v. Burget*, 486 U.S. 94, 100 (1988), the court inverted the analysis. Proceeding from the premise that OG&E enjoyed blanket immunity, the Tenth Circuit imposed on *Trigen* the burden of demonstrating that OG&E's

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[5] At trial, by contrast, OG&E took the much narrower position that state-action immunity "reach[es] only one thing in this case, Your Honor, the RTP rate." 10th Cir. App. vol. XI at 3031. The court below declined to hold OG&E to this position. *See* App. 7a-8a.

challenged conduct "somehow destroy[ed]" that immunity. App. 11a.

Third, the Tenth Circuit sought to distinguish this Court's holding in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976), that even a regulated utility must "comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." The evidence established beyond any doubt that the cooling services market found by the jury was just such a "competitive area[ ] of the economy," and OG&E in fact had conceded that "Trigen and OG&E are direct and substantial competitors in Oklahoma City," OG&E 10th Cir. Br. 9. Nonetheless, the court below found it dispositive that "OG&E is selling only one thing -- electricity at state-regulated rates." App. 11a.

For the court below, in sum, all that mattered was that OG&E's rates for electricity are approved by the OCC. *See* App. 7a (holding that its determination that "all of [OG&E's] regulated electricity sales are [immune] . . ., standing alone, is enough to mandate dismissal of the federal antitrust claims"). So long as OG&E did not "sell" another product, OG&E was immune from liability for any and all anti-competitive conduct, whether or not the challenged conduct concerned OG&E's rates and whether or not the State authorized or supervised the challenged conduct.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether the federal antitrust laws will apply to a broad range of companies in the many States that are attempting to manage the transition to reduced levels of regulatory oversight and increased reliance on competition in the electric power and other traditionally regulated industries. Under the status-based immunity doctrine adopted by the Tenth Circuit, every private company whose basic rates for traditional services are approved by regulators will enjoy a sweeping license to

engage in unauthorized and unsupervised non-price predation. The Tenth Circuit's holding simply ignores this Court's precedents, and if it is allowed to stand at this critical time, it will substantially impair the States' ability to deal effectively with changing conditions in regulated and deregulating industries.

I. THE TENTH CIRCUIT'S EXPANSION OF STATE-ACTION IMMUNITY WILL FRUSTRATE THE STATES' ABILITY TO FASHION FLEXIBLE AND APPROPRIATE RESPONSES TO INCREASED COMPETITIVE ACTIVITY BY TRADITIONALLY REGULATED COMPANIES

The decision below adopted a status-based rule for state-action immunity that, if allowed to stand, would extend the States' immunity to private parties far beyond what this Court's precedents permit. *See infra.* The decision below would transform the state-action immunity doctrine from a sharply limited and "disfavored" exemption from the otherwise-encompassing Sherman Act, *Ticor Title,* 504 U.S. at 636,[6] into a sweeping license permitting utilities whose rates for regulated services are approved to suppress competition with impunity by means of unsupervised non-price predation. This expansion of private-party immunity will allow incumbents to destroy new entrants and deprive consumers of the fruits of competition. As this Court already has recognized, "[t]he national policy in favor of competition" embodied in the antitrust laws is far too important to tolerate such easy evasion. *Midcal,* 445 U.S. at 106; *see also City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398 (1978) ("Congress, exercising the full

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[6] At least one Member of this Court has questioned whether the States' immunity *ever* extends to private parties. *See id.* at 641 (Scalia, J., concurring) ("I am skeptical about the *Parker v. Brown* exemption for state-programmed private collusion in the first place.") (citation omitted).

extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country.") (footnotes omitted). Under this Court's precedents, any implied antitrust immunity for private parties is narrowly limited. *See also, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986) ("exemptions from the antitrust laws are strictly construed and strongly disfavored").

1. This Court's intervention to correct such a departure from its precedents would be warranted even if the issue involved were of only ordinary significance. The decision below, however, comes at a critical time of transition in the Nation's regulated industries and involves issues of surpassing importance. Many States are addressing demands by regulated utilities in several industries (including electricity, natural gas, and telecommunications) to compete in new, unregulated markets. At the same time, many States are experimenting with or considering introducing competition into traditionally regulated markets. These initiatives require the States to grapple with difficult issues of cross-subsidization, potential abuse of monopoly power, maintenance of service quality and reliability, and consumer welfare. *See* R. Bolze, J. Peirce & L. Walsh, *Antitrust Law Regulation: A New Focus for a Competitive Energy Industry*, 21 Energy L. J. 79, 79 (2000) ("With the deregulation of both the electric and natural gas markets . . . the antitrust laws are rapidly gaining importance."). To meet these new challenges, States are developing and testing new regulatory schemes to supplement or replace regulations that have been in place for a half-century but are too inflexible and cumbersome to protect the public interest in today's rapidly-evolving commercial environment.[7] Whether these

[7] In place of traditional rate-of-return rate regulation, for example, States are experimenting with "codes of conduct," "price-cap" regulation, "performance-based ratemaking," and "real-time pricing," as well as with allowing new "energy service companies" to compete for utilities'

initiatives will be successful, and whether they will benefit consumers, remains to be seen. But the last thing that States need at this critical time is the confusion and frustration that the decision below will generate.

Indeed, this case provides a striking example of the importance of the antitrust laws during a transition to competition in a regulated industry. *Cf.* R. Bolze, et al., *Antitrust Law Regulation,* 21 Energy L. J. at 79 ("Because incumbent utilities may retain significant market power during the initial stages of deregulation, they may be likely targets for antitrust scrutiny."). With better than twice OG&E's efficiency in converting fuel to energy, and with an independent power producer as a parent company, Trigen was a potentially formidable competitor in the Oklahoma City retail electricity market once that market was deregulated. 10th Cir. App. vol. VI at 1182-89. OG&E implemented its Plan of Action to remove customers from Trigen not only because of its desire to monopolize the market for cooling services, but also in order to reduce the impact of this potential competition. *See* 10th Cir. App. vol. IX at 2429-30.[8]

The effects of the decision below will extend far beyond the parties and the industries involved in this case. Even within the States of the Tenth Circuit, dozens of incumbents in a variety of industries -- electric companies, water companies, local telecommunications exchange carriers,

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customers. *See generally* National Ass'n of Regulatory Utility Comm'rs, *Codes of Conduct Governing Competitive Market Developments in the Energy Industry: An Analysis of Regulatory Actions* (Nov. 2000) (http://www.naruc.org/Resolutions/2000_conv/codes_of_conduct_white_paper.htm).

[8] At the time of trial, retail electricity deregulation was scheduled to be implemented by July 1, 2002. *See* 17 Okla. Stat. § 190.4(B)(3) (1997). Oklahoma recently suspended further formal deregulation pending completion of a report by a special commission. *See* 2001 Okla. Sess. Laws 397, § 4 (June 9, 2001) (to be codified as 17 Okla. Stat. § 190.20).

sewerage companies, gas companies, and pipeline companies -- have their rates for services approved by state regulators.[9] Under the decision below, each of these incumbents, like OG&E, will be free to engage in non-price predation without fear of antitrust liability, even where no regulator actively supervises its anti-competitive conduct.

Affording broad status-based immunity to private parties is antithetical to the States' efforts as well as to the national policy in favor of competition. What is more, it undermines each State's authority to decide for itself how to structure and manage industries that are vital to the health and welfare of its citizens. Among the States and across the many industries affected by the decision below, regulation exists on a spectrum. Especially in the current environment of nascent deregulation, States quite reasonably may choose a middle ground between total command-and-control supervision of an industry's operations and total reliance on the free market and the antitrust laws. *See* R. Bolze, et al., *Antitrust Law Regulation*, 21 Energy L. J. at 81 (predicting that States will "shift away from prescriptive regulation toward 'light-handed' regulation that aims to structure a competitive market"). This Court's decisions recognize as much and respect the States' choices by affording immunity where, but only where, "an anticompetitive act of a private party . . . [is] fairly attributable to the State." *Patrick*, 486 U.S. at 100.

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[9] *See, e.g.*, Colo. Rev. Stat. § 40-8.5-103 (electric companies); 4 Colo. Code Regs. §§ 723-2-2.34 & 723-5-2 (ILECs and water companies); Kan. Stat. Ann. §§ 66-101, 66-104, 66-1188, 66-1201, & 66-1231 (electric, telecommunications, water, pipeline, and gas companies); N.M. Stat. Ann. § 62-3-3 (electric, water, gas, and sewerage companies); N.M. Stat. Ann. § 63-9A-3 (telecommunications companies) (repealed eff. July 1, 2003); 17 Okla. Stat. § 151(b), (c) & (d) (gas, electric, and water companies); Okla. Corp. Comm'n Rule OAC 165:55-1-4 (ILECs); Utah Code §§ 54-2-1 & 54-8b-2 (electric, gas, sewerage, railroad, telecommunications, and water companies); Wyo. Stat. § 37-1-101 (electric, gas, water, and pipeline companies).

2. The Tenth Circuit's decision interferes with States' rights to choose from a spectrum of regulatory options. This Court's decision in *Ticor Title* teaches that affording a broader immunity to private parties would compromise the States' freedom to choose the types and levels of regulation that they believe appropriate for particular industries. Agreeing with the 36 States that had filed a brief "deny[ing] that respondents' broad immunity rule would serve the States' best interests," the Court explained:

> If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. . . . *By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.*

504 U.S. at 635-36 (emphasis added).

The decision below is fundamentally inconsistent with this Court's recognition that the States need "regulatory flexibility." *See also id.* at 637. Under the decision below, a State will be in regulation for a pound if it is in for a penny; Oklahoma's approval of OG&E's rates, standing alone, will render OG&E immune for any and all non-price conduct. The Tenth Circuit's decision effectively will prohibit Oklahoma from deciding that a company's rates should be regulated, but that the company in other respects should remain subject to the federal antitrust laws. By preventing Oklahoma from balancing its displacement of the antitrust laws to conform to its actual regulatory objectives vis-à-vis private parties, the decision below leaves Oklahoma for practical purposes with a choice between total regulation (the only condition under which total displacement of the antitrust laws would be tolerable) and no regulation (and total reliance on the antitrust laws).

Such a result ignores this Court's admonition in *Ticor Title* that "[n]either federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *Id.* at 636. No precedent, and no conceivable policy, support forcing such an artificial and undesirable choice upon the States.

II. THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENTS BY ADOPTING A STATUS-BASED VIEW OF IMMUNITY THAT IGNORED THE ANTI-COMPETITIVE CONDUCT AT ISSUE

1. A private party's claim to immunity demands an analysis of its conduct, not its status. Unlike States, private parties -- even regulated companies -- enjoy no blanket immunity from the federal antitrust laws. Under this Court's precedents, immunity attaches to a private party's *actions* that constitute *state action* -- not to private *parties* that may be state-regulated *actors*. To show that its anti-competitive conduct "should be deemed state action and thus shielded from the antitrust laws," a private party must satisfy "a rigorous two-pronged test." *Patrick*, 486 U.S. at 100. First, a private party must show that "the challenged restraint [is] 'one clearly articulated and affirmatively expressed as state policy.' Second, the anticompetitive conduct 'must be actively supervised by the State itself.'" *Id.* (quoting *Midcal*, 445 U.S. at 105; other internal quotation omitted). As this Court explained, "[t]he active supervision requirement stems from the recognition that '[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Id.* (citation omitted).

This Court's cases leave no room for doubt that the analysis of a private party's claim to share the State's

immunity must focus on the State's involvement in the particular private conduct challenged as anti-competitive. *Patrick*, for example, teaches that the "active supervision" requirement

> is designed to ensure that the state-action doctrine will shelter *only the particular anticompetitive acts of private parties* that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control *over the challenged anticompetitive conduct.*

Id. at 100-01 (emphases added).

This Court's decision in *Ticor Title* made it even more clear that a private party enjoys state-action immunity only if the specific private conduct at issue qualifies as state action. The Court explained that both of *Midcal*'s requirements "are directed at ensuring that *particular anticompetitive mechanisms* operate because of a deliberate and intended state policy." 504 U.S. at 636 (emphasis added). *Midcal*'s first prong, which requires "a clear and affirmative policy to allow the anticompetitive conduct," *id.* at 631, "cannot alone ensure, as required by our precedents, that *particular anticompetitive conduct* has been approved by the State." *Id.* at 637 (emphasis added). "In the absence of active supervision in fact," a private party's actions are not immune. *Id.* at 638.[10]

This Court thus has recognized that a private party may enjoy the State's immunity for certain conduct, while remaining subject to liability for other conduct. *See, e.g., City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991); *Cantor*, 428 U.S. at 596. Nothing in

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[10] *Accord, e.g., Midcal*, 445 U.S. at 106 (holding that because the State did not engage in "pointed reexamination" of the challenged program, the State's involvement constituted only "a gauzy cloak" that could not thwart "[t]he national policy in favor of competition").

any of this Court's decisions remotely suggests that a private party enjoys a blanket free pass for any and all anti-competitive conduct simply because *some* of its conduct is "affirmatively expressed as state policy" and "actively supervised" by the State. In *Cantor*, for example, the Court held that an electric utility was not immune for its conduct in providing free replacement light bulbs, even though the utility had included that practice in an approved tariff filing. Even a regulated utility, this Court emphasized, remains subject to "antitrust standards to the extent that it engages in business activity in competitive areas of the economy," such as the unregulated light-bulb market. 428 U.S. at 596.[11]

2. The Tenth Circuit adopted a presumption of immunity based on status that ignored the anti-competitive conduct at issue. This expanded immunity doctrine cannot be reconciled with this Court's precedents in several respects.

First, and most fundamentally, the Tenth Circuit adopted a status-based view of private-party immunity that rendered irrelevant Oklahoma's involvement (or, more accurately, non-involvement) in the particular conduct that Trigen challenged. The court below recited *Patrick*'s holding that the State must "exercise ultimate control over the challenged anticompetitive conduct." App. 9a (quoting *Patrick*, 486 U.S. at 100-01). But it then proceeded to hold that OG&E's status as a regulated company was dispositive, while ignoring "the challenged anticompetitive conduct" at issue in this case: "As a state-regulated electric utility," the court

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[11] *See also City of Lafayette*, 435 U.S. at 417 (plurality op.) ("even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization"); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 706 (1962) (no immunity because the "exclusion" at issue "resulted from the action of [a private party] taken within the area of its discretionary powers"); *cf. Ticor Title*, 504 U.S. at 636 (observing that a State "may regulate its public utilities without authorizing monopolization in [an unregulated] market").

held, "OG&E has clearly met the two-prong test for state action immunity." App. 9a.

a. In keeping with this status-based holding, the Tenth Circuit never considered whether Oklahoma actively supervised the anti-competitive conduct challenged by Trigen. The court simply stated that "[t]he OCC . . . actively supervises OG&E, meeting the second part of the test for state action immunity," while noting that "[t]he OCC has 'general supervision' over OG&E." App. 10a. No one disputes that the OCC "supervises OG&E," *id.*, to some extent and in some respects. The relevant question under this Court's precedents, however, is whether "the particular anticompetitive conduct at issue . . . [was] supervised by governmental actors." *Ticor Title*, 504 U.S. at 634.

The Tenth Circuit's reliance on the existence of powers of "general supervision" is foreclosed by *Patrick* and *Ticor Title*. In *Patrick*, this Court held without dissent that Oregon had not actively supervised the anti-competitive termination of hospital privileges there at issue even though a state agency had "general supervisory powers" over hospitals' peer-review procedures. 486 U.S. at 102. Likewise, the Tenth Circuit's observation that the OCC has certain powers over electric utilities, App. 9a-10a, ignores this Court's holding in *Ticor Title* that "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State," and that only "active supervision in fact" can "ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State." 504 U.S. at 637-38; *see also Patrick*, 486 U.S. at 101 ("The mere presence of some state involvement or monitoring does not suffice.").[12]

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[12] The dissenters in *Ticor Title* argued that the requirement of active supervision of the particular anti-competitive conduct at issue was too strict. *See* 504 U.S. at 641-46 (Rehnquist, C.J., joined by O'Connor, J., and Thomas, J., dissenting); *id.* at 646-47 (O'Connor, J., joined by Thomas, J., dissenting). It bears emphasis that even if this requirement were relaxed so that only *some* of the anti-competitive conduct at issue

b. The Tenth Circuit also did not consider whether Oklahoma had "articulated a clear and affirmative policy to allow the anticompetitive conduct" challenged by Trigen. *Ticor Title*, 504 U.S. at 631. In holding that *Midcal*'s first prong was satisfied because "Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities," App. 8a, without considering whether Oklahoma had articulated a policy to allow the anti-competitive conduct at issue, the Tenth Circuit again failed to heed this Court's precedents.

Although OG&E was not required to "'point to a specific, detailed legislative authorization' for its challenged conduct," App. 8a, the Tenth Circuit failed to recognize that the critical question under *Midcal*'s first prong "is whether the [respondent's] challenged conduct was taken pursuant to a clearly articulated state policy." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62 (1985); *see also Ticor Title*, 504 U.S. at 636 ("Both [of *Midcal*'s elements] are directed at ensuring that *particular anticompetitive mechanisms* operate because of a deliberate and intended state policy") (emphasis added). Oklahoma may have articulated a policy to have electricity rates set under a regulatory scheme rather than by market forces, but none of the Oklahoma constitutional provisions or statutes relied upon by the Tenth Circuit (App. 9a-10a, 26a-32a) articulates any policy to allow the types of non-price anti-competitive conduct at issue here.[13]

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need have been actively supervised, the Tenth Circuit's reliance on the existence of powers of "general supervision" still would fail. Indeed, because it did not require *any* supervision in fact, the decision below would fail even the undemanding standard adopted by the lower court in *Ticor Title* and expressly rejected by this Court. *See id.* at 637 (holding that the lower court's requirement of "some basic level of activity" is "insufficient to establish the requisite level of active supervision").

[13] *See also, e.g., Community Commun. Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (holding that *Midcal*'s first prong was not satisfied because

Second, the Tenth Circuit turned the proper analysis on its head when it finally addressed OG&E's predatory conduct. In the court of appeals' view, Trigen was contending "that OG&E's alleged 'bad acts' somehow destroy OG&E's state action immunity." App. 11a. The quoted formulation betrays a complete failure to comprehend this Court's precedents. Under this Court's decisions, immunity could attach to OG&E's "bad acts" only if OG&E made the "rigorous" showing that its challenged conduct was clearly authorized and actively supervised by the State. *Patrick*, 486 U.S. at 100.

The Tenth Circuit inverted this analysis and transformed private-party immunity from a "disfavored" and limited doctrine, *Ticor Title*, 504 U.S. at 636, into a seemingly conclusive presumption. Because of its status-based view of the scope of immunity, the Tenth Circuit began from the premise that OG&E, as a state-regulated utility, enjoyed blanket immunity. Instead of considering whether OG&E had shown that the particular anti-competitive acts at issue in this case were immune, the court asked whether Trigen had shown that OG&E's challenged conduct "somehow destroy[ed]" OG&E's immunity. Then, suggesting that the burden it had imposed on Trigen was an impossible one, the court concluded that the particular anti-competitive conduct charged (and proved to the jury's satisfaction) was quite irrelevant: "[E]ven if OG&E had committed these alleged 'bad acts,' its state action immunity would remain intact." App. 11a. For the Tenth Circuit, the fact that OG&E is a regulated company whose rates are approved by the State,

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the State had not "'contemplated' the specific anticompetitive actions" at issue); *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942 (9th Cir. 1996) ("the fact that Washington may have displaced competition in the market for sale of natural gas with a regulatory structure is not dispositive. Rather, the relevant question is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the Sherman Act.").

without more, rendered OG&E an arm of the State itself, entitled to immunity for anything and everything that it might do.[14]

Third, the Tenth Circuit attempted to distinguish this Court's decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), but the decision below squarely conflicts with *Cantor*. In *Cantor*, this Court held that even a regulated utility must "comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy," such as the market for electric light bulbs there at issue. *Id.* at 596. It would defy reality to deny that the "area[ ] of the economy" in which OG&E and Trigen competed is precisely such a "competitive area[ ]." OG&E's own documents reveal that it saw Trigen as a serious competitive threat, and OG&E expressly conceded on appeal that "Trigen and OG&E are direct and substantial competitors in Oklahoma City." OG&E 10th Cir. Br. 9.

Moreover, the jury found that OG&E competed in -- indeed, had monopolized -- "the market for cooling services to commercial and government buildings in downtown Oklahoma City." 10th Cir. App. vol. III at 476 (charge). The jury's finding that the market for cooling services was the relevant market, of course, was conclusive unless the Tenth

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[14] In contrast to the decision below, recent decisions of the Third and Ninth Circuits have recognized that *Ticor Title* requires that immunity be denied where the particular conduct at issue was not actively supervised. *See A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, ___ F.3d ___, ___, 2001 WL 708447, at *16-17 (3d Cir. June 19, 2001) (acknowledging that "[t]he States actively and continually monitor the implementation of *portions* of the Multistate [tobacco] Settlement Agreement," but denying immunity "because the States' supervision does not reach the parts of the Multistate Settlement Agreement that are the source of the antitrust injury. *It is the conduct that violates the antitrust laws that states must 'actively supervise' in order for Parker immunity to attach.*") (emphasis added); *Snake River Valley Elec. Ass'n v. PacifiCorp*, 238 F.3d 1189, 1195 (9th Cir. 2001) (holding that PacifiCorp was not immune because Idaho did not "review the specific conduct at issue").

Circuit could hold that judgment as a matter of law was required on that factual issue under Fed. R. Civ. P. 50's strict standard. No such holding would have been possible on the record here, and the Tenth Circuit in any event never even mentioned the jury's finding or Rule 50.

Nonetheless, the Tenth Circuit held that *Cantor* did not apply here because "OG&E is selling only one thing -- electricity at state-regulated rates." App. 11a. Although this portion of the decision below is far from clear, the Tenth Circuit appears to have held that OG&E could not have participated in an unregulated market within the meaning of *Cantor* so long as OG&E sold only electricity. *See* App. 11a (stating that Trigen "contends" that OG&E participated "in the unregulated cooling services market. We disagree. First, OG&E is selling only one thing -- electricity at state-regulated rates."). The court's simplistic focus on what "OG&E is selling," however, misses the point.

In the first place, as this Court has held, markets are not defined by what the litigants are "selling," but rather by what consumers are buying. *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482 (1992) (holding that market definition depended on "a factual inquiry into the 'commercial realities' faced by consumers"); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956) ("commodities reasonably interchangeable by consumers make up that 'part of the trade or commerce,' monopolization of which may be illegal"). Even if a company "sells" only a single product, it may participate in numerous markets. *See also United States v. Continental Can Co.*, 378 U.S. 441, 452-58 (1964).

Second, as explained above, this Court's precedents make clear that private-party immunity turns on the relationship between the State and the challenged *conduct* -- not on what the defendant "is selling." Because of the requirement that the particular anti-competitive *conduct* at issue have been actively supervised, a party may be immune

for certain conduct, but not immune for other conduct, even if the party produces only one product or competes in only one market. Put simply, immunity attaches to conduct, not to products or markets. In *Ticor Title*, for example, the relevant question was not whether the defendants' title search and examination businesses were "regulated products" or "regulated markets" -- they surely were, to some extent and in some respects -- but rather whether the "particular anticompetitive conduct" at issue had been "approved by the State." 504 U.S. at 637.

Accordingly, the Tenth Circuit's statement that OG&E "is selling only one thing" cannot obscure the reality that OG&E was "engage[d] in business activity in [a] competitive area[ ] of the economy." *Cantor*, 428 U.S. at 596.[15] Just as this Court held that Detroit Edison's conduct in the competitive area of light bulb distribution was governed by "antitrust standards," OG&E's unsupervised conduct in the competitive area of cooling services is not immune. *Cf. Ticor Title*, 504 U.S. at 636 (observing that a State "may regulate its public utilities without authorizing monopolization in [an unregulated] market"). Under the Tenth Circuit's expanded immunity doctrine, however, so long as OG&E does not "sell" another product, OG&E is immune from liability for anything and everything that it might do, whether or not the challenged conduct consists of charging approved rates and whether or not the State

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[15] In addition to being legally irrelevant, the Tenth Circuit's statement also ignores that OG&E in fact did offer bundled services, including financing packages and construction guarantees. 10th Cir. Supp. App. at 70-71 (OG&E proposal stating that "Our Design/Build Team will install a central plant at the Myriad Convention Center" and offering financing). Nor (contrary to the Tenth Circuit's belief) can one customer's decision to decline OG&E's offer of these services change the fact that OG&E offered them. *See* App. 12a n.1.

authorized or supervised the challenged conduct. This holding cannot be reconciled with this Court's precedents.[16]

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Because the view of private-party immunity adopted by the Tenth Circuit threatens far-reaching practical consequences in conflict with this Court's precedents and the fundamental national policy in favor of competition, *certiorari* should be granted.[17]

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[16] Finally, in holding that OG&E could not have competed in the market for cooling services because OG&E "does *not* sell the electric chillers that are necessary for cooling," App. 11a (emphasis in original), the Tenth Circuit made a basic error. Products and services need only be reasonably interchangeable to be in the same market, and companies need not provide an identical package of services to be competitors. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966). The unrebutted evidence in this case was that cooling services consumers viewed OG&E and Trigen as the sole relevant competitors, and the cost of electric chillers alone did not significantly affect their choice. 10th Cir. App. vol. IX at 2307-17, 2352-53. Accordingly, the fact that a cooling services consumer that chooses OG&E needs the additional input of a chiller is of no moment.

[17] The terse holding below that Trigen's state-law antitrust and tortious interference claims are "collateral attacks" on OCC orders that must be brought before the OCC, *see* App. 13a-14a, was premised upon the same erroneous holding that this case involved no unregulated conduct. *See* App. 14a (asserting erroneously and without citation that "the heart of Trigen's complaint is that OG&E's rates are too low"). In addition to being premised upon the error of federal law for which Trigen seeks *certiorari*, the court's state-law decision patently conflicts with decisions of the Oklahoma Supreme Court holding that because of "the inability of the [OCC] to entertain a suit for money damages," a claim "for breach of a duty where damages are sought [falls] particularly within the province of the district courts." *MM Res., Inc. v. Huston*, 710 P.2d 763, 765 (Okla. 1985); *see also, e.g., Kingwood Oil Co. v. Hall-Jones Oil Corp.*, 396 P.2d 510, 512 (Okla. 1964) (holding that the OCC has no jurisdiction to hear "an action for damages sounding in tort"). While Trigen does not seek *certiorari* to review the correctness of this decision under Oklahoma law, Trigen respectfully requests that this Court vacate the judgment of the court below in its entirety so that the court may reconsider the state-

CONCLUSION

For the reasons stated, *certiorari* should be granted.

Respectfully submitted,

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law question "free from the compulsion of an erroneous view of federal law," *Hicks v. Feiock*, 485 U.S. 624, 640 (1988) (citing *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984)); *see also Ohio v. Reiner*, 121 S. Ct. 1252, 1254 (2001) (per curiam), and, if appropriate, certify the state-law question to the Oklahoma Supreme Court, *see* 20 Okla. Stat. § 1601 *et seq.*; *Leck v. Continental Oil Co.*, 800 P.2d 224, 228 (Okla. 1989) (in response to certified question from court below, holding that "[t]he district court *does* have subject matter jurisdiction to hear a damage action . . . .") (emphasis in original).